

STATE OF MICHIGAN
COURT OF APPEALS

LARRY J. OLSEN and MARY E. OLSEN, ¹

UNPUBLISHED
May 25, 1999

Plaintiffs-Appellees,

v

No. 205031
Wayne Circuit Court
LC No. 96-645266 NO

TOYOTA TECHNICAL CENTER, U.S.A., INC.,

Defendant-Appellant.

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

In this action brought pursuant to the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, defendant appeals by leave granted the order of the lower court denying its motion for summary disposition based upon a finding that plaintiff's claims were not barred by the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131; MSA 17.237(131). We affirm.

In September 1990, plaintiff applied for a maintenance position with defendant. Because of a prior work-related back injury and two prior back surgeries, plaintiff was requested by and did provide to defendant a certification from the Michigan Department of Education certifying him as a vocationally handicapped worker with a back impairment. Plaintiff was offered the position and he began working for defendant in October 1990. At the time of his hire, plaintiff was placed on restrictions with respect to heavy lifting. For the first several years of his employment, plaintiff received excellent performance evaluations.

In 1993, defendant demanded that plaintiff perform tasks that required him to do lifting in excess of his weight lifting restrictions. Plaintiff's requests for assistance were denied. As a result of performing these tasks, plaintiff re-injured his back. After the re-injury, defendant's management employees and supervisors harassed plaintiff, refused to allow him to use work time to obtain medical treatment and continued to order plaintiff to perform lifting beyond his physical limitations.

Similar events transpired in 1994 and 1995. In April 1995, plaintiff took a medical leave and in August 1995, he underwent fusion surgery, which rendered plaintiff totally and permanently disabled. In October 1995, plaintiff sought reconsideration of a denial of social security disability benefits. In the Request for Reconsideration, plaintiff stated that he was "totally disabled from gainful activity." Plaintiff was eventually terminated from his employment with defendant on August 9, 1996.

On November 1, 1996, plaintiff, along with his wife, filed suit against defendant alleging that during his employment defendant discriminated against plaintiff on account of his handicap. The acts of discrimination manifested themselves in the form of unfavorable job assignments. Plaintiff alleged that defendant demanded that he perform tasks beyond his limitations, essentially in retaliation for plaintiff being certified vocationally handicapped.

Defendant contends that it was entitled to summary disposition because plaintiff's claims are barred by the exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131; MSA 17.237(131). We disagree. Because the handicappers' civil rights act and the workers' disability compensation act seek to remedy different "evils" in the workplace, claims arising out of violations of the handicappers' civil rights act are not barred by the exclusive remedy provision of the workers' disability compensation act. Cf *Boscaglia v Michigan Bell Telephone Co*, 420 Mich 308, 315; 362 NW2d 642 (1984). We see no reason to depart from this rule simply because, in addition to mental and emotional damages, plaintiff also suffered a disabling back condition.

Next, defendant claims that plaintiff is estopped from pursuing a claim under the handicappers' civil rights act because he represented to the Social Security Administration that he was permanently disabled effective April 13, 1995. Defendant reasons that if plaintiff were permanently disabled he was not, by definition, a handicapper entitled to protection under the handicappers' civil rights act. In support of this position, defendant relies upon this Court's decision in *Tranker v Figgie International, Inc*, 221 Mich App 7; 561 NW2d 397 (1997). However, after remand for reconsideration by the Supreme Court,² this Court reversed its original decision. *Tranker v Figgie International, Inc.*, 231 Mich App 115; 585 NW2d 337 (1998). In *Tranker II*, this Court held that because the standards utilized to determine disability under the Social Security Act and under the handicappers' civil rights act differ, receipt of social security disability benefits does not necessarily bar a claim for handicap discrimination. In any event, unlike *Tranker*, in this case plaintiff did not represent to the Social Security Administration that he was disabled at the time that he alleges he was a handicapper entitled to protection under the handicappers' civil rights act.

Next, defendant argues that plaintiff cannot recover for acts of discrimination occurring prior to November 1, 1993, as they are barred by the three-year statute of limitations applicable to discrimination claims. Because we find that plaintiff has alleged a timely violation of the handicappers' civil rights act and other acts of discrimination alleged are sufficiently related so as to constitute a pattern of discrimination, pursuant to the continuing violations doctrine, it is appropriate for the trial court to consider damages for connected conduct that would be otherwise time-barred. *Sumner v Goodyear*, 427 Mich 505, 525; 398 NW2d 368 (1986).

Next, defendant argues that any damages to which plaintiff might be entitled should be cut-off after April 13, 1995, the date plaintiff admits he became totally and permanently disabled. We disagree. Defendant cites a string of federal district court cases for the proposition that "it is well settled that an employee claiming employment discrimination is not entitled to lost wages for any period during which the employee has been totally disabled because the employee is not entitled to collect wages for [sic] which the employee would not have made in any event."⁸ The rationale in those cases appears to be that defendant's exposure to liability should be limited because the plaintiffs would have been rendered unable to work regardless of the defendant's conduct. While these cases hold that an unrelated disability will cut off an employer's exposure to damages in an employment discrimination case, the rationale does not apply when the disability is allegedly a product of the acts of discrimination. Therefore, under the facts of this case, we see no merit in defendant's argument that the April 13, 1995, date of disability will serve to cut-off recoverable damages.

Finally, defendant argues that plaintiff is only entitled to seek damages that are not recoverable pursuant to the workers' disability compensation act. We find that plaintiff is entitled to recover all damages that he can show are causally related to violations of the Handicappers' Civil Rights Act subject to the provisions of MCL 37.1606(4); MSA 3.550(606)(4).

In *Slayton v Michigan Host, Inc*, 122 Mich App 411, 417; 332 NW2d 498 (1983), this Court addressed the issue of damages in a civil rights action. The Court stated:

Turning back to the case at bar, we note that the plaintiff has alleged not only several forms of mental anguish but also loss of wages, loss of professional esteem, damage to the plaintiff's career, loss of pension rights and employee benefits, loss of seniority, and loss of employment. We find that these injuries, if proven to have resulted from sexual discrimination rather than from a disability, are not barred as a matter of law by the Worker's Disability Compensation Act because they are not compensable under the act. [*Pacheco v Clifton*, 109 Mich App 574; 311 NW2d 801 (1981); *Stimson v Bell Telephone Co*, 77 Mich App 369; 258 NW2d 227 (1977).] This holds true also for the plaintiff's claims against defendants . . . for intentional infliction of emotional distress, interference with the plaintiff's contract of employment, and interference with the plaintiff's advantageous business relationships. Plaintiff should have an opportunity to adjudicate these claims at trial. [*Id.* at 417.]

Following *Slayton*, the Supreme Court addressed the issue of damages in *Boscaglia v Michigan Bell Telephone*, 420 Mich 308, 316-317; 362 NW2d 642 (1984):

The question whether physical, mental and emotional injuries are compensable under the [Fair Employment Practices Act] or the civil rights act has not been briefed or argued, and hence we intimate no opinion in that regard. We think it self-evident, however, assuming the Legislature in enacting the civil rights acts intended to provide compensation for physical, mental or emotional injury resulting from discrimination, that it did not intend that objective would be defeated by the bar of the exclusive remedy provision of the workers' compensation act. Whatever may have been the intention of

the Legislature in enacting the exclusive remedy provision of the workers' compensation act, if it intended in enacting civil rights legislation that workers discharged in violation of such legislation could recover for resulting physical, mental or emotional injury that intention would necessarily supersede or modify the scope of other legislation that otherwise would defeat the intent to permit such recovery. [*Boscaglia, supra*, 420 Mich 316-317, footnotes omitted.]

In addition, MCL 37.1606(4); MSA 3.550(606)(4), requires that any compensation awarded for lost wages under the handicappers' civil rights act must be reduced by the amount of compensation received for lost wages under the workers' disability compensation act.

We conclude that plaintiff can recover any damages, economic and non-economic alike, that can be shown to be causally related to the alleged discrimination subject to a reduction for wage lost benefits received under the workers' disability compensation act. As this Court stated in *Slayton, supra*, at 417, "plaintiff should have an opportunity to adjudicate these claims at trial."

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

¹ Mary E. Olsen's claims are derivative in nature; thus, in this opinion, "plaintiff" will refer to Larry J. Olsen, only, unless otherwise indicated.

² *Tranker v Figgie International, Inc*, 456 Mich 931; 575 NW2d 553 (1998).

³ Defendant relies upon the opinions in *Hatton v Ford Motor Co*, 508 F Supp 620 (ED Mich, 1981); *EEOC v Indep Stave Co, Inc* 754 F Supp 713 (ED Mo, 1991); *Endress v Helms*, 617 F Supp 1260 (DDC, 1985) and *Saulpaught v Monroe Comm Hosp*, 62 FEP Cases (BNA) 1315 (CA 2, 1993).